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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XG959

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to the U.S. Navy Training and Testing Activities in the Hawaii-Southern California Training and Testing Study Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; receipt of application for regulations and Letters of Authorization extension; request for comments and information.

SUMMARY: NMFS has received a request from the U.S. Navy (Navy) to extend the expiration date from December 2023 to December 2025 for Marine Mammal Protection Act (MMPA) regulations authorizing the take of marine mammals incidental to Navy training and testing activities conducted in the Hawaii-Southern California Training and Testing (HSTT) Study Area. In August 2018, the MMPA was amended by the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year 2019 to allow for seven-year authorizations for military readiness activities, as compared to the previously allowed five years. The Navy's activities qualify as military readiness activities pursuant to the MMPA as amended by the NDAA for Fiscal Year 2004. In making the request to extend the time period covered by the MMPA 2018 HSTT regulations from five to seven years, the Navy proposes no changes to their specified activities, the geographical region in which those activities would be conducted,

mitigation measures, monitoring, or reporting over the longer seven-year period. NMFS invites the public to provide information, suggestions, and comments on the Navy's application.

DATES: Comments and information must be received no later than **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: Comments on the application should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.Piniak@noaa.gov*.

Instructions: NMFS is not responsible for information or comments sent by any other method, to any other address or individual, or received after the end of the comment period. Information and comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All information and comments received are a part of the public record and will generally be posted online at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act> without change. All personal identifying information (*e.g.*, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Wendy Piniak, Office of Protected Resources, NMFS, (301) 427-8401. An electronic copy of the Navy's application may be obtained online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities>. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review and the opportunity to submit comments.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such takings are set forth.

NMFS has defined “negligible impact” in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The MMPA states that the term “take” means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal.

The NDAA for Fiscal Year 2004 (2004 NDAA) (Pub. L. 108-136) amended section 101(a)(5) of the MMPA to remove the “small numbers” and “specified geographical region” provisions indicated above and amended the definition of “harassment” as it applies to a “military readiness activity” to read as follows (Section 3(18)(B) of the MMPA): (i) Any act that

injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild (Level A Harassment); or (ii) Any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered (Level B Harassment). In addition, the 2004 NDAA amended the MMPA as it relates to military readiness activities such that least practicable adverse impact shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

More recently, section 316 of the NDAA for Fiscal Year 2019 (2019 NDAA) (Pub. L. 115-232), signed on August 13, 2018, amended the MMPA to allow incidental take rules for military readiness activities under section 101(a)(5)(A) to be issued for up to seven years. Prior to this amendment, all incidental take rules under section 101(a)(5)(A) were limited to five years.

Summary of Request

On March 11, 2019, NMFS received an adequate and complete application from the Navy requesting that NMFS extend the 2018 HSTT regulations (83 FR 66846) and associated Letters of Authorization (LOAs) such that they would cover take incidental to seven years of training and testing activities instead of five, extending the expiration date from December 20, 2023 to December 20, 2025. The extension would be conducted through a proposed and final rulemaking analyzing seven years of activity, consistent with the requirements of section 101(a)(5)(A). Specifically, the activities include training and testing (all categorized as military readiness activities) including the use of active acoustic sonar systems and other transducers, in-water detonations, air guns, construction activities involving pile removal and installation, and

the operation of a fleet of vessels throughout the HSTT Study Area. These activities may result in the incidental take of marine mammals in the form of Level B harassment (behavioral disruption or temporary hearing impairment), Level A harassment (permanent hearing impairment or tissue damage), or serious injury or mortality in a very small number of cases.

Description of Activity

In its 2019 application, the Navy proposes no changes to the nature of the specified activities covered by the 2018 HSTT final rule, the level of activity within and between years would be consistent with that previously analyzed in the 2018 HSTT final rule and all activities would be conducted within the same boundaries of the HSTT Study Area identified in the 2018 HSTT final rule. Therefore, the training and testing activities (*e.g.*, equipment and sources used, exercises conducted) and the mitigation, monitoring, and reporting measures are identical to those described and analyzed in the 2018 HSTT final rule. The only changes included in the Navy's request are to conduct those same activities in the same region for an additional two years. In its request, the Navy included all information necessary to identify the type and amount of incidental take that may occur in the two additional years so NMFS could determine whether the analyses and conclusions regarding the impacts of the proposed activities on marine mammal species and stocks previously reached for five years of activities remain the same for seven years of identical activity.

Regarding the quantification of expected takes from acoustic and explosive sources (by Level A harassment and Level B harassment, as well as mortality resulting from exposure to explosives), the number of takes are based directly on the level of activities (days, hours, counts, etc., of different activities and events) in a given year. In the 2018 HSTT final rule, take estimates across the five-years were based on the Navy conducting three years of a representative

level of activity and two years of maximum level of activity. Consistent with the pattern set forth in the 2017 application, the 2018 HSTT Final Environmental Impact Statement/Overseas Environmental Impact Statement (FEIS/OEIS, www.hstteis.com/), and the 2018 HSTT final rule, the Navy proposes to add one additional representative year and one additional maximum year to determine the predicted take numbers in this rule. Specifically, as in the 2018 HSTT final rule, the Navy proposes to use the maximum annual level to calculate annual takes (which would remain identical to what was determined in the 2018 HSTT final rule), and the sum of all years (four representative and three maximum) to calculate the seven-year totals for this rule.

The existing 2018 HSTT regulations authorize three serious injuries or mortalities from vessel strike in the HSTT Study Area over five years. Based on a revised vessel strike analysis encompassing seven years of activities, the Navy requests no change in the number of requested large whale mortalities due to vessel strike. The large whale stocks that are proposed to be taken by vessel strike are the same as those included in the 2018 HSTT final rule.

As noted above, the proposed extension of the rule would include mitigation, monitoring, and reporting measures that are identical to those included in the 2018 HSTT final rule. Mitigation would include procedural mitigation measures and mitigation areas. Procedural mitigation includes, but is not limited to, the use of trained Lookouts (protected species observers) to monitor for marine mammals in mitigation zones, requirements for Lookouts to immediately provide notification of sightings to the appropriate watch station, requirements for implementation of powerdown and shutdown mitigation measures (based on activity defined zones), pre- and post-monitoring requirements for explosive events, and measures to reduce the likelihood of ship strikes. Chapter 5 of the 2018 HSTT FEIS/OEIS and the *Mitigation Measures* section of the 2018 HSTT final rule include detailed descriptions of mitigation measures for each

specified activity in the HSTT Study Area. The Navy will also implement mitigation measures within certain areas (Mitigation Areas) and/or at times to avoid or minimize potential impacts on marine mammals in areas and/or times where they are known to engage in biologically important behaviors (i.e., for foraging, migration, reproduction), where the disruption of those behaviors would be more likely to result in population-level impact. The *Mitigation Measures* section in the 2018 HSTT final rule includes detailed descriptions of geographic mitigation measures in the HSTT Study Area. Maps and tables of the mitigation areas can be found in Chapter 5 of the 2018 HSTT FEIS/OEIS.

The Navy proposes to continue forward the implementation of the robust Integrated Comprehensive Monitoring Program and Strategic Planning Process outlined in the current regulations. The Navy's monitoring strategy, currently required by the 2018 HSTT regulations, is well-designed to work across Navy ranges to help better understand the impacts of the Navy's activities on marine mammals and their habitat by focusing on learning more about marine mammal occurrence in different areas and exposure to Navy stressors, marine mammal responses to different sound sources, and the consequences of those exposures and responses on marine mammal populations. Similarly, the proposed extension of regulations would include identical adaptive management provisions and reporting requirements as the existing regulations. Please refer to Chapter 13 of the Navy's application for full details on the monitoring and reporting proposed by the Navy.

Information Solicited

Interested persons may submit information, suggestions, and comments concerning the Navy's request (see **ADDRESSES**). NMFS will consider all information, suggestions, and

comments related to the request during the development of proposed regulations governing the incidental taking of marine mammals by the Navy, if appropriate.

Dated: April 30, 2019.

Donna S. Wieting,

Director, Office of Protected Resources,

National Marine Fisheries Service.

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